



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

MAR 02 2005

Thomas J. Josefiak, Esq.
P.O. Box 10648
Arlington, VA 22210

RE: MUR 5525 (Bush-Cheney '04)

Dear Mr. Josefiak:

On September 7, 2004, the Federal Election Commission notified your clients, Bush-Cheney '04 and David Herndon, as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaints and information provided by you, the Commission, on February 17, 2005, found that there is reason to believe that Bush-Cheney '04 and David Herndon, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 434, provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information. Please note that respondents have an obligation to preserve all documents, records and materials relating to the Commission's investigation.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

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This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Peter Blumberg, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Michael E. Toner
Vice Chairman

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

Respondents: Bush-Cheney '04, Inc. and David
Herndon, in his official capacity as
treasurer

MUR: 5525

I. INTRODUCTION

This matter was generated by a complaint filed by Kerry-Edwards 2004 on August 30, 2004. *See* 2 U.S.C. § 437g(a)(1). The complaint alleged that Bush-Cheney '04 violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by coordinating expenditures with Swift Boat Vets and POWs for Truth. Bush-Cheney '04 has denied all allegations in its response to the complaint.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

The allegations against Bush-Cheney '04 center around its relationship with Swift Boat Vets and POWs for Truth. Swift Boat Vets is a Section 527 organization established on April 23, 2004, that has not registered as a political committee with the Commission, nor is associated with any registered political committee. Swift Boat Vets' activities and public statements have been exclusively geared toward criticizing John Kerry during his presidential campaign, and it has funded its activities with nonfederal funds raised outside the limitations and prohibitions of the Act. In its IRS disclosure reports, Swift Boat Vets reported receipts of \$18,715,390 and disbursements of \$22,565,360 during the 2004 calendar year.¹ In its electioneering

¹The discrepancy between receipts and disbursements may be due to IRS disclosure thresholds. The Internal Revenue Code provides for the disclosure of donations to Section 527 organizations by donors who give an aggregate of \$200 or more to the organization during a calendar year and does not require the disclosure of total donations. *See* 26 U.S.C. § 527(j)(3)(B).

communications reports filed with the Commission, Swift Boat Vets reported \$20,941,845 in donations for communications that cost \$18,813,850. Several individuals have given in excess of \$1 million to Swift Boat Vets, which also accepts corporate funds in a separate account.

The complaint notes various reported connections between persons associated with Swift Boat Vets and persons associated with the Republican Party and/or President Bush's reelection campaign. Most prominent is Kenneth Cordier, a retired Air Force colonel who served as a member of the Bush-Cheney '04 Veterans National Steering Committee. In June 2004, Cordier gave a speech to the Veterans of Foreign Wars on behalf of Bush-Cheney '04. Soon after giving that speech, Cordier was recruited by Swift Boat Vets to become a member of that organization. In August, Cordier appeared in one of Swift Boat Vets' television advertisements. After Cordier informed Bush-Cheney '04 of his involvement with Swift Boat Vets, Bush-Cheney '04 relieved him of his position as a member of the Veterans Steering Committee.² Cordier has stated to the media that the crossover between his time with Bush-Cheney '04 and with Swift Boat Vets was inadvertent and that his involvement with Swift Boat Vets was independent of his activities with Bush-Cheney '04.

The complaint also alleges that Swift Boat Vets and Bush-Cheney '04 sponsored a joint rally in Alachua, Florida, though both organizations have denied playing any role in the event. The complaint also states that many donors to Swift Boat Vets have also donated to President Bush's campaign or to the Republican Party. For example, Bob Perry, who gave \$6,000,000 to Swift Boat Vets, has also given millions of dollars to Republican candidates and committees. Perry is also a longtime political associate and friend of Karl Rove, Bush's chief political strategist.

² Bush-Cheney '04 and Swift Boat Vets also shared the same legal counsel, Benjamin Ginsberg, who likewise resigned from Bush-Cheney '04 after his dual role was publicized.

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B. Coordinated Communications with Bush-Cheney '04

Publicly available information supports investigating whether Swift Boat Vets coordinated expenditures for its television advertisements or other activities with Bush-Cheney '04. *See* 11 C.F.R. § 109.21. A communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three-part test: (1) payment by a third party; (2) satisfaction of one of four “content” standards;³ and (3) satisfaction of one of six “conduct” standards. *See* 11 C.F.R. § 109.21.

In this matter, the first prong of the coordinated communication test is satisfied because Swift Boat Vets is a “person other than [the] candidate, authorized committee, political party committee, or agent of any of the foregoing” that paid for television advertisements. 11 C.F.R. § 109.21(a)(1). The second prong of this test, the content standard, is satisfied because Swift Boat Vets’ television advertisements qualify as “public communications” under 11 C.F.R. § 109.21(c)(4). Bush-Cheney '04 does not dispute that these two prongs are satisfied. Rather, a finding that Swift Boat Vets engaged in coordinated communications depends, at this stage, on an analysis of its activities under the “conduct” prong of the coordinated communication test.

The conduct standard is met if the communication is made at the “request or suggestion” or with the “material involvement” of the candidate, an authorized committee, a political party committee, or agent thereof; or after “substantial discussion” with the relevant candidate or committee. 11 C.F.R. § 109.21(d). Regarding “material involvement,” the conduct prong is satisfied if a candidate or his authorized committee is materially involved in decisions regarding the communication, such as its content, intended audience, means or mode, specific media outlet

³ In *Shays v FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *appeal filed*, No. 04-5352 (D.C. Cir. Sept. 28, 2004), the District Court invalidated the content standard of the coordinated communications regulation and remanded it to the Commission for further action consistent with the Court’s opinion. In a subsequent ruling, the Court explained that the “deficient rules technically remain ‘on the books,’” and did not enjoin enforcement of this (or any other) regulation pending promulgation of a new regulation. *Shays v FEC*, 340 F. Supp. 2d 39, 41 (D.D.C. 2004).

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used, timing or frequency, or size or prominence. *See* 11 C.F.R. § 109.21(d)(2). Similarly, the conduct prong is satisfied if a communication is produced after one or more “substantial discussions” about the communication between the person paying for the communication and an authorized committee. 11 C.F.R. § 109.21(d)(3). A “substantial discussion” is one in which material information about the candidate’s campaign plans, projects, activities or needs is conveyed to a person paying for the communication. *Id.*

Here, there is reason to investigate whether Swift Boat Vets coordinated its communications with Bush-Cheney ‘04 through Kenneth Cordier. Cordier served as a member of the Bush-Cheney ‘04 Veteran’s National Steering Committee at the same time as he appeared in a television advertisement for Swift Boat Vets. Swift Boat Vets and Bush-Cheney ‘04 shared the goal of defeating John Kerry, and both organizations concurrently utilized Cordier to focus on veterans’ issues in achieving that goal. Cordier’s dual positions thus warrant examining whether he possessed and conveyed information concerning Bush-Cheney ‘04’s “plans, projects, activities, or needs” or whether he was materially involved in decisions regarding the content or other aspects of Swift Boat Vets’ television advertisements. *See* 11 C.F.R. § 109.21(d).

Although Bush-Cheney ‘04 claims that Cordier’s position was honorary and did not grant him access to the campaign’s strategy, plans, projects, activities, or needs, Bush-Cheney ‘04 did not provide any statements from campaign officials or other affirmative evidence to support this contention. For example, no specific information was provided as to the exact nature of Cordier’s service to Bush-Cheney ‘04 or as to what information Cordier had access to. Instead, Bush-Cheney ‘04 simply asserts that the allegations are “preposterous.” Because Bush-Cheney ‘04 has offered only conclusory statements about the nature of Cordier’s positions, an inquiry is appropriate to determine if its broad and unsworn assertions can be substantiated and confirmed.

The complaint also contends that coordination can be evidenced by a campaign rally in Florida focusing on veterans that was allegedly sponsored by both Bush-Cheney '04 and Swift Boat Vets. The supplement to this complaint attached a flier publicizing this rally, which states that the event was sponsored by the Alachua Bush-Cheney Committee and Swift Boat Vets, among other groups. Both Bush-Cheney '04 and Swift Boat Vets have explicitly disavowed their involvement in this event, contending that they did not hold or even authorize the rally. As with Cordier's service, an inquiry would be appropriate to verify that this campaign rally was organized by local activists independent of both Bush-Cheney '04 and Swift Boat Vets.

Overall, given the lack of specific information provided by Bush-Cheney '04 to counter the allegations, there is sufficient evidence to investigate whether Swift Boat Vets coordinated its communications or other expenditures with Bush-Cheney '04. The regulations specify that a payment for a coordinated communication is made for the purpose of influencing a federal election, constitutes an in-kind contribution to the candidate or committee with whom or which it is coordinated, and must be reported as an expenditure made by that candidate or committee. *See* 11 C.F.R. § 109.21(b)(1). Therefore, there is reason to believe that Bush-Cheney '04, Inc. and David Herndon, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 434 by accepting and failing to report excessive in-kind contributions.⁴

⁴ Because Bush-Cheney '04 received public funding for the general election, it may also have made excessive campaign expenditures if it accepted in-kind contributions from Swift Boat Vets. *See* 26 U.S.C. §§ 9003(b)(2) and 2 U.S.C. §§ 441a(b) and 11 C.F.R. § 104.13(a).